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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MELODY CARTER,

Defendant and Appellant.

B172965

(Los Angeles County
Super. Ct. No. NA050627)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Modified and affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director and Ronnie Duberstein, Staff Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Mary Sanchez, Supervising Deputy Attorneys General for Plaintiff and Respondent.

Melody Carter appeals from the termination of probation and imposition of a prison term following a finding that she was in violation of probation. She claims the trial court punished her by sentencing her to the midterm because she insisted on her right to a probation violation hearing. The record does not support this claim. Appellant also claims the court erred in imposing an increased restitution fine when it terminated her probation. We agree, and modify the judgment accordingly.

FACTUAL AND PROCEDURAL SUMMARY

In April 2002, appellant was charged by information with possession of methamphetamine for sale, transportation of methamphetamine, and driving when her license had been suspended for driving under the influence of an alcoholic beverage or drug. Appellant pled no contest to these charges, imposition of sentence was suspended, and she was placed on formal probation for three years. The court imposed a \$200 restitution fine. Among the probation conditions were drug testing and drug and alcohol counseling.

In April 2003, appellant's probation officer recommended that she be found in violation and her probation revoked because she had not been testing and had been dismissed from her drug program. On May 7, appellant was arrested after a search of her apartment yielded a syringe and baggies containing methamphetamine. Her probation was revoked. On May 29, appellant admitted a violation of probation and waived her right to a hearing. The court found her in violation, revoked and reinstated probation with the modification that appellant serve 90 days in county jail, with credit for 33 days.

In October 2003, the court reviewed a probation report recommending that appellant be found in violation of probation and that her probation be revoked and sentence imposed. The court revoked probation and set a date for a formal probation violation hearing. Following a December 2003 hearing, the court found appellant in violation and revoked probation. She was sentenced to the midterm of three years in state prison on the transportation count; and to a concurrent 16-month term on the possession

count. She was ordered to pay a \$600 restitution fine. A parole revocation fine in the same amount was imposed and suspended. This is a timely appeal from the judgment.

DISCUSSION

I

When appellant appeared in court on October 29, 2003 regarding the alleged violation of probation, the court noted appellant had two positive tests for amphetamine and methamphetamine. The court stated that if appellant admitted the violation, it would sentence her to the low term. If she did not admit the violation, it would be low, middle, or high term. Appellant chose not to admit the violation. She claims the court punished her for exercising her right to a probation violation hearing by sentencing her to the middle term.

A court may not offer to treat a defendant more leniently in return for a plea of guilty or nolo contendere, nor may it punish a defendant more harshly for exercising the right to a trial. (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279; *People v. Collins* (2001) 26 Cal.4th 297, 307.) But “[t]here must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right.” (*People v. Angus* (1980) 114 Cal.App.3d 973, 989-990.) More must be shown than the “naked fact” that the court offered one term before the hearing and imposed a higher term afterward. (*Id.* at p. 990.) In this case, appellant has shown only that the court offered the low term if she admitted the violation, and imposed the middle term after the hearing. That is not sufficient.

Appellant challenges the respondent’s recitation of evidence at the hearing in support of the court’s sentencing choice. She claims consideration of this evidence violates California Rules of Court, rule 4.435(b)(1). Under that rule, when a court sentences a defendant upon revocation of probation, “[t]he length of the sentence shall be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term nor in deciding whether to strike the additional punishment for enhancements charged and found.” But where probation previously has been revoked and reinstated, the court may consider the defendant’s conduct during the time

between the original grant of probation and the reinstatement of probation. (*People v. Downey* (2000) 82 Cal.App.4th 899, 917.)

Evidence at appellant's hearing included her conduct during the period before reinstatement of probation. Lilith Williams, appellant's probation officer, was first asked to describe appellant's performance on probation from May 29, 2003, after probation was reinstated, to the hearing date. The question was expressly directed to appellant's drug testing during that period. Ms. Williams testified about appellant's testing. This evidence could not be considered with respect to the level of sentence to be imposed. But then Ms. Williams was asked: "How would you evaluate or describe Miss Carter in terms of her performance on probation?" She replied, "Miss Carter has done extremely poor as a probationer. She refuses to take responsibility for any of her actions. It's always someone else's fault. . . . Her attitude has been extremely poor throughout this period of time. She's extremely difficult to work with because of her inability to admit that she's doing anything."

On cross-examination, Ms. Williams was asked whether appellant had been involved in an outpatient drug program for one year. She replied, "Successfully? No." Ms. Williams stated that appellant had been in a program with the City of Long Beach from February 27 to the present, a period of eight months, but had not successfully completed the program. Before that, appellant had been in another program, but that program refused to work with her any longer and referred her back to the probation department for reassessment.

The court indicated the basis of its decision: appellant had been given multiple opportunities and had rejected every one; she had not cooperated with the probation department; and she had been manipulative throughout the process. All these factors were amplified by Ms. Williams' testimony at the hearing about appellant's performance on probation prior to reinstatement on May 29, 2003. On this record, there is no indication the court selected the mid term to punish appellant for exercising her right to a probation violation hearing. Instead, it appears the court selected the mid term based on properly considered evidence of circumstances prior to the reinstatement of probation.

II

When appellant originally was placed on probation, the court imposed a restitution fine of \$200. When the court revoked probation and imposed a prison term, it also imposed a \$600 restitution fine and stayed a \$600 parole revocation fine. Appellant asserts, and respondent agrees, that the trial court erred in imposing a new and higher restitution fine when revoking probation.

A restitution fine imposed at the time a defendant is placed on probation remains in force even after the revocation of probation. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822.) There is no statutory authority for the imposition of a second fine upon revocation of probation, and it must be stricken. (*Id.* at p. 823.) In addition, the stayed parole revocation fine must be reduced to \$200 so that it is equal in amount to the original \$200 restitution fine. (Pen. Code, § 1202.45.)

DISPOSITION

The judgment is modified by striking the \$600 restitution fine imposed by the trial court and reducing the stayed parole revocation fine to \$200. The original \$200 restitution fine remains in force. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the Department of Corrections.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.